Augustine Foong Boo Jang v Public Prosecutor

COURT OF APPEAL (BANDAR SERI BEGAWAN) — CRIMINAL APPEAL NO 8 OF 1989
DEREK CONS AG PRESIDENT, HUNTER AND BOKHARY COMMISSIONERS
14 NOVEMBER 1989

Criminal Law — Rape — Defence of consent — Allegation of continuing sexual relationship prior to rape — Whether inference of consent to be drawn from victim's lack of resistance — Whether laceration of hymen amounted to corroboration of victim's evidence — Penal Code, ss 375(a) & 376

Evidence — Corroboration of rape victim's evidence — Whether laceration of hymen amounted to corroboration — Whether judge was aware of risk of acting upon victim's uncorroborated evidence

The applicant was convicted of the offence of rape and now sought leave to appeal under r 18(1)(b) of the Criminal Appeal Rule. The sole issue was consent, as the applicant contended that he had a continuing sexual relationship with the complainant (who was his maid) since two months prior to the alleged rape and that the incident had taken place with her consent. The applicant's wife also gave evidence in support of the applicant that the complainant had confessed to her that she was having an association with the applicant of some long standing. The applicant also contended that the trial judge was not aware of the risk of acting upon the complainant's uncorroborated evidence and that he erred in saying that the laceration of the complainant's hymen amounted to corroboration. The applicant also said that an inference of consent should be drawn from the complainant's lack of resistance.

Held, dismissing the application:

(1) After considering the evidence given by the complainant, the applicant and the wife, the trial judge wholly accepted without hesitation the evidence of the complainant. He was perfectly well aware of the risk of acting upon uncorroborated evidence and was prepared to act upon that evidence alone.

(2) The court disagreed with the contention that the laceration of the hymen did not amount to corroboration. In the circumstances of this case, such evidence did support the complainant's account of lack of consent because the applicant had alleged that there had been a continuing consent to continuous intercourse extending over a period of at least two months prior to the rape. The doctor made it clear that this recent laceration was consistent with recent intercourse. It is difficult to see that it could be consistent with intercourse extending over that whole period.

(3) There is a fundamental difference between consent and submission. Consent always imports submission; submission does not necessarily import consent. The applicant had established a position of dominance over the complainant as she was completely dependent on him financially. She was afraid of doing anything which might prejudice her position and her employment and it is not difficult to see why she did not resist perhaps as strenuously as has been suggested she should have done. It is perfectly apparent from her own story that she did put up as much resistance as she could.

Cases referred to

1 *Chiu Nang Hong* v *PP* [1965] 1 MLJ 40 (refd)
2 *R* v *Olugboja* [1981] 3 All ER 443 (refd)
3 *DPP* v *Morgan* [1976] AC 182 (refd)

Legislation referred to

Criminal Appeal Rule r 18(1)(b)
Penal Code ss 375(a), 376

Yu Chin Chai for the applicant.
Magdalene Chong (Mrs) (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Hunter Commissioner (delivering the judgment of the court): The applicant, Augustine Foong Boo Jang, was convicted by Mr Commissioner Hopkinson on 6 June 1989, of the offence of rape. The charge was that on 6 September 1988 at his flat, he had raped his Filipino maid, Nena Agamata, contrary to s 375(a) and 376 of the Penal Code. From that conviction the applicant now seeks leave to appeal under r 18(1)(b) of the Criminal Appeal Rule.

The sole issue at the trial was consent. It was not disputed that intercourse has taken place between Nena (PW11), the complainant, and the applicant on that day. But it was said that this had taken place with her consent. That matter was bound to turn as it did particularly upon an assessment of the credibility of the witnesses. The judge was very impressed by the credibility of the complainant as a witness. He wholly accepted her evidence and rejected both that of the applicant and of his present wife. It is therefore apparent from the outset that this is a very difficult appeal to conduct, despite Mr Yu's strenuous efforts upon the applicant's behalf.

The story goes back to June 1986, when the complainant started to work for the applicant. He was a widower. She was employed to look after his young daughter, then aged four. She led a very restricted life. Overtly, as he said in evidence in the court below, to protect her from falling into bad company, he imposed a very restrictive regime upon her. She had no days off out of the flat; only in the flat. She had no friends. She was rebuked for talking to Filipinos. She was not allowed to go to her own church. She must have led a very isolated existence. In September 1987, the applicant remarried and in June 1988, the complainant went on leave, returning to the Philippines. In March of that year the applicant stopped paying her any salary to ensure that she came back from that leave. Indeed her back salary was paid to her in July upon her return. But strangely enough, after her return in July, save for that back pay, her current pay was not paid to her. This was peculiarly strange because it was also the start, on the applicant's account, of an adulterous association between him and the complainant.

The complainant said that the first sexual familiarity took place with her objecting on 29 July 1988. There was another occasion on 1 September 1988 which was somewhat more serious. The incident in question which gave rise to the charge took place on 9 September 1988. Her

account was shortly to this effect. The applicant returned to the flat at lunch time which seems to have been his normal practice. She was there with the daughter, who was asleep. She was doing the ironing, but she says that he grabbed her, and pushed her out to the floor of the bedroom, removed her clothes and pushed his penis into her with his hands. This caused her great pain so he stopped. That insertion caused bleeding from her private parts and some staining on the carpet. There was then an attempt to clean up and further sexual familiarity was, she said, imposed upon by the applicant. The applicant's account is quite different. He said that this sexual relationship started with the complainant quite early in July, and that he and she had been having intercourse three or four times a week. There was no question of her being an unwilling party from the start back in July. This was still the same on 9 September 1988.

Following the incident, the complainant telephoned a lady at the Philippines Consulate, clearly in distress. She complained of what had happened and that she had been raped. She was also at that time too frightened to give her name. She rang again the next morning. She gave her name on that occasion, and that led to a police investigation. She was medically examined later that day and found to have suffered a recent laceration of her hymen consistent with recent intercourse. The wife gave evidence in support of her husband, that following these events, the complainant had confessed to her that she was having an association with her husband of some long standing.

In those circumstances, as have I said, the judge had first to deal with the issue of credibility. He had ample opportunity of considering the evidence given by the complainant, the applicant and the wife, particularly the first two who were in the witness box for some considerable period. His conclusion, as I have already indicated, was that he accepted without hesitation the evidence of the complainant. He said, in relation to the applicant:

> I do not believe his account of events nor do I believe that she had been willingly having an affair with him since July. This evidence does not even raise a reasonable doubt in my mind.

He had earlier considered the conflict between the complainant and the wife, and preferred the complainant to the wife. He summed up his assessment of the complainant in these terms:

> On the other hand, I do believe her evidence in general, and particularly that she was not willing to have sex with him that day. I consider that her evidence on this is corroborated by the recent laceration of her hymen which the doctor found the next day. Even if it does not amount to corroboration, her evidence so impressed me that, scrutinizing it closely, and also the facts of the case, and after bearing in mind the danger of convicting on the uncorroborated evidence of the victim in a sex case, I am nevertheless quite sure that she was without any doubt speaking the truth. So even if there had been no corroboration, it would not have mattered, and I would have been ready to act on her uncorroborated evidence.

Now, that is the clearest possible conclusion from the trial judge that he wholly accepted the evidence of the complainant and would have acted upon it alone. A point has been taken on corroboration. It is said that what he had said was wrong and that the laceration of the hymen did not amount to corroboration. We disagree. We feel, in the circumstances of this case, that that evidence did support her account of lack of consent, because the consent alleged here had been a continuing consent extending over a period of at least two months to continuous intercourse between the parties over that time. The doctor made it clear that this recent laceration was consistent with recent intercourse. It is very difficult to see that it could be consistent with intercourse extending over that whole period.

We were referred to the Privy Council decision in *Chiu Nang Hong* v *PP*[1] where the Privy Council said that a judge who was convicting on uncorroborated evidence must make it quite clear that he was conscious of the risk that he was taking in acting on that evidence alone. It is perfectly apparent from the passage. I have read from the judge's judgment that this judge was perfectly well aware of the risk of acting upon uncorroborated evidence and that he was perfectly prepared to act upon that evidence alone.

Basically, what has been repeatedly emphasized to us is the evidence of what has been called 'lack of resistance', from which it is suggested that some inference of consent should be drawn. I think it should be borne in mind that there is a fundamental difference between consent and submission. Consent always imports submission, submission does not necessarily import consent. There are two paragraphs in a report made to the Home Secretary in England which are set out in the judgment in *R* v *Olugboja*[2] at p 447. The report says this:

> 20 As Smith and Hogan point out in their textbook on the *Criminal Law* (3rd Ed (1973) p 326): 'Earlier authorities emphasized the use of force; but it is now clear that lack of consent is the crux of the matter and this may exist though no force is used. The test is not 'was the act against her will?' but 'was it without her consent'?
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> 21 It is, therefore, wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape. We have found this erroneous assumption held by some and therefore hope that our recommendation will go some way to dispel it.

The really significant element in this case which the judge himself emphasized was the relationship between the applicant and this maid, and the position of dominance he had established over her. I quote again from the judgment:

> ... she was completely dependant on him financially. He controlled her entire existence.

Her fear, and her inability to give her name on the telephone later on that afternoon, out of fear, demonstrated

the hold that he had. She was afraid of doing anything which might prejudice her position and her employment. It is not very difficult to see why she did not resist perhaps as strenuously as has been suggested she should have done. But it is perfectly apparent from her own story that she did put up as much resistance as she could.

Finally, it has been suggested that there was a lack here of mens rea, and we have been referred to the House of Lords decision in *DPP* v *Morgan*.[3] Assuming without deciding that the principle of *Morgan*[3] applies in Brunei, it is apparent to us that this case is of no assistance to this applicant. The point was not in fact taken or even canvassed in the court below for obvious reasons. On the facts here it was quite impossible to draw any distinction between the fact of consent and reasonable belief in consent. Either this girl had consented since July to a sexual relationship or she had not. There was no half-way house. There was indeed no assertion by the applicant in the witness box of a reasonable belief. The matter was not even canvassed. The judge's rejection of continuing consent going back to July makes this a point of no assistance to the application in this court.

For these reasons we can see no fault in the judge's approach or in his reasons. The application fails and must be rejected.

Application dismissed.

Solicitors: *Yu & Chiew.*

Reported by *Ng Sheau Jiuan*

MALAYSIAN REPORTS

Gan Tuck Meng & Ors v Ngan Yin Groundnut Factory Sdn Bhd & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO 22-219-87
PEH SWEE CHIN J
5 OCTOBER 1989

Civil Procedure — Interlocutory injunction — Shares in company — Voting rights — Dispute between members — Threatened removal of managing director — Whether serious question to be tried — Equitable estoppel

Companies and Corporations — Shares in private company — Deceased member — Transmission of shares to personal representatives — Whether consent of directors necessary — No joint application by personal representatives for transmission — No grant of probate extracted — Whether registration of transmission invalid — Joint holders of shares — Voting rights — By whom exercisable — Beneficial owner of shares — Duty of registered owner to beneficial owner — Companies Act 1965, s 103

Trusts and Trustees — Will — Executors and trustees required to act jointly — Transmission of shares — No joint application by executors and trustees for transmission — No grant of probate extracted — Whether registration of transmission invalid — Duty of trustee to beneficiary — Equitable estoppel

The first defendant was a company in which 199,998 shares in its capital were registered in the name of the estate of one Ngan Yin, deceased. By his will, the deceased had appointed the second defendant and one of his daughters as the executors of the will. The executors had themselves registered as joint holders of the said shares in the share register of the first defendant in their capacity as personal representatives of the deceased, with the name of the second defendant appearing first in the register, with the result that the voting rights carried by the said shares were exercisable only by the second defendant as provided to that effect in the articles of association of the first defendant. The registration of the said shares in the names of the executors was effected at a time when the grant of the probate of the will had not been extracted yet. It was common ground that a total of 49,999 shares constituting a quarter of the said shares were beneficially owned by the first plaintiff.

The plaintiffs who were owners of the shares in the first defendant commenced an action against the defendants seeking: (a) an injunction restraining the second defendant from exercising the voting rights relating to the said shares; (b) an injunction restraining the second defendant from removing the first plaintiff as managing director of the first defendant; and (c) an order that the first defendant do forthwith rectify the register of members in respect of the said shares. The plaintiffs later applied for an interlocutory injunction praying for the same relief.

It was argued for the first plaintiff that the registration of the names of the second defendant and his co-executrix as holders of the said shares in their capacity as personal representatives of the deceased was void because the will provided that they were to act jointly and that the consent of the co-executrix to the registration had not been obtained. Another ground raised was that the grant of probate had not been extracted at the time of the registration. The third ground was that the consent of the board of directors of the first defendant to the registration had not been obtained and hence the registration was effected contrary to s 103(2) and (3) of the Companies Act 1965 ('the Act').